

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESPERANZA DIAZ DEL CASTILLO,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Defendant.

CASE NO. C05-1122JLR

ORDER

I. INTRODUCTION

This matter comes before the court on a motion for summary judgment from Defendant Washington State Department of Social and Health Services (“DSHS”) (Dkt. # 82). Having reviewed the motion and all documents filed in support and opposition, the court GRANTS the DSHS’s motion.

II. BACKGROUND

Plaintiff Esperanza Diaz Del Castillo, a 60-year old Hispanic woman, began working for the DSHS on July 28, 2003. The DSHS hired Ms. Del Castillo as a Disability Adjudicator in its Division of Disability Determination Services (“DDS”), a division responsible for conducting medical determinations on disability claims for the federal Social Security Administration. The DDS required Ms. Del Castillo to complete a six-month probationary period and a 17-week training program, which are prerequisites

1 for all new adjudicators. Fisk Aff. ¶ 4 (Dkt. # 90). Ms. Del Castillo's claims arise out of
 2 her experiences during training and the DDS's decision to terminate her probationary
 3 employment.

4 **A. Ms. Del Castillo's Training**

5 The DDS initially provided classroom instruction to the ten new adjudicator
 6 trainees hired in July 2003. Ms. Del Castillo contends that her classroom instructor,
 7 Kelly Fisk, generally resented her questions during lessons, in contrast to Ms. Fisk's
 8 favorable responses to the questions of younger, Caucasian trainees. Del Castillo Decl. ¶
 9 12 (Dkt. # 101).¹ By Ms. Del Castillo's account, on two occasions, Ms. Fisk provided the
 10 class with an example of returning a DDS claimant to gainful employment by explaining
 11 that a Hispanic claimant could be referred to an appropriate job as a "taco maker." *Id.* at
 12 ¶¶ at 45-47.² Ms. Del Castillo later lodged a complaint concerning the remark with Ms.
 13 Fisk's supervisor and DDS Regional Manager, Randy White. *Id.* at ¶ 47. Ms. Del
 14 Castillo avers that because she complained, Ms. Fisk summarily ejected her from a
 15 subsequent class. *Id.* at ¶¶ 40-44. In directing Ms. Del Castillo to go home, Ms. Fisk
 16 stated that Ms. Del Castillo appeared ill and that she did not "want [Ms. Del Castillo's]
 17 germs." *Id.* at ¶¶ 40-44. Ms. Del Castillo's testimony confirms that she was in fact ill.
 18 *Id.* at ¶ 39.

21 ¹The DSHS moves to strike Ms. Del Castillo's declaration on the basis that she
 22 electronically filed the document approximately 45 minutes after the filing deadline. *See* Reply at
 23 11 (Dkt. # 105). The court denies the DSHS's motion as there is no evidence that the delay
 24 prejudiced the DSHS. In addition, the court denies as moot Ms. Del Castillo's motion to strike
 the affidavits of Vicki Maher and Laura White, which the court does not rely on in considering the
 DSHS's motion.

25 ²Ms. Fisk vigorously disputes this allegation, contending that she stated just the opposite;
 26 In explaining that an adjudicator should not suggest jobs according to ethnic stereotypes, she
 27 provided examples of inappropriate recommendations, including that a Hispanic claimant become
 28 a taco maker, and a Jewish claimant become a kosher pickle maker. Fisk Aff. ¶ 23; *see also* White
 Aff. ¶ 17 (Dkt. # 88).

1 Ms. Del Castillo contends that Mr. White derided her by poking fun at her Spanish
2 surname. During introductions of the trainees to DDS staff and management, Mr. White
3 requested that Ms. Del Castillo “translate” her name. When she translated “Del Castillo”
4 to “of the castle,” Mr. White dubbed Ms. Del Castillo as “royalty in the Seattle DDS.”
5 Id. at ¶ 13.

6 Mr. White assigned Ms. Del Castillo and one other trainee to the third floor of its
7 Seattle office – in the proximity of their supervisor, Ashley Brothers. White Aff. ¶ 13.
8 Mr. White assigned the remaining eight trainees to the fourth floor. Id. Ms. Del Castillo
9 contends that her physical isolation from the majority of trainees impeded her progress
10 during training, as her co-trainees located on the fourth floor received more one-on-one
11 instruction from their respective supervisors and various medical consultants. Del
12 Castillo Decl. ¶ 25. Ms. Del Castillo’s allegations as to the inadequacy of training focus
13 on the shortcomings of Ms. Brother’s supervision. She contends that Ms. Brothers was
14 frequently inaccessible. Id. at ¶ 20. Ms. Del Castillo also avers that Ms. Brothers
15 required her to submit questions in writing – in contrast to other employees. Id. at ¶¶
16 20, 21, 24. By Ms. Del Castillo’s account, Ms. Brothers complained about Ms. Del
17 Castillo’s “strong” Spanish accent. Id. at ¶ 49. Ms. Del Castillo further contends that on
18 one occasion, Ms. Brothers admonished her for speaking Spanish with a DDS claimant,
19 explaining that the DDS, “paid interpreters to do that job.”³ Id. at ¶ 48.

20 In November 2003, the DDS presented each trainee with a certificate signifying
21 the completion of classroom training. Ms. Del Castillo refused to accept the certificate
22 because it contained the “diminutive” “Espie,” rather than her full name, Esperanza. Id.
23 at ¶ 31.

25 ³According to Ms. Brothers, Ms. Del Castillo was permitted speak Spanish with Spanish-
26 speaking claimants. Brothers Aff. ¶ 14 (Dkt. # 89). Ms. Brothers contends that the only issue to
27 arise concerning Spanish communication was Ms. Del Castillo’s provision of assistance to an
28 employee from a separate DSHS division in the translation of documents. Id. On that occasion,
Ms. Brothers informed Ms. Del Castillo that she was not certified to work as an interpreter. Id.

1 **B. Ms. Del Castillo's Performance Evaluations**

2 After several weeks of classroom instruction and hypothetical case assignment, the
3 DDS provided the trainees, including Ms. Del Castillo, with actual cases to process. In
4 September 2003, Ms. Brothers noted that Ms. Del Castillo appeared to misunderstand
5 instructions and that she was experiencing difficulty with software programs. Fisk Aff. ¶
6 14, Ex. A at 2, 3. Specifically, Ms. Brothers observed that Ms. Del Castillo was not
7 requesting the proper information from DDS clients or sending requests for information
8 to the correct source. Id. On October, 21, 2003, Ms. Brothers noted several additional
9 areas of concern. Id. at 7, 8.

10 In Ms. Del Castillo's November 20, 2003 evaluation, Ms. Brothers again noted
11 several areas of concern, including difficulties with intake and development of claims,
12 failure to choose the correct clinic or medical provider, failure to request medical
13 information from all available sources, problems with following the proper steps in
14 ordering a consultative exam, confusion concerning medical claims, and difficulties with
15 the process of closing claims. Fisk Aff., Ex. A at 10-14; Brothers Aff. ¶¶ 26-27. In her
16 written response, Ms. Del Castillo blamed the inadequacy of her training. Fisk Aff., Ex.
17 A at 15.

18 On December 5, 2003, Ms. Del Castillo received yet another performance
19 evaluation. Based on the observations of Ms. Brothers, Ms. Fisk, and Mr. White, Ms.
20 Del Castillo was not progressing despite four months of training. Brothers Aff. ¶ 32. Ms.
21 Brothers placed Ms. Del Castillo on a performance plan to provide her with clear
22 direction as to her supervisors' expectations and the basis for concerns. Id., Ex. G. The
23 performance plan required Ms. Del Castillo to provide Ms. Brothers with information
24 regarding her case assessments, and to meet with Ms. Brothers on a daily basis. Id. By
25 Ms. Brothers account, she spent an "inordinate" amount of time assisting Ms. Del
26 Castillo. Id. at ¶ 33.

1 **C. Ms. Del Castillo's Request for a Transfer**

2 On December 11, 2003, Ms. Del Castillo contacted Mr. White to request a transfer
3 to another unit. See White Aff. ¶ 21, Ex. A (stating that she was up to the "challenge" of
4 another position). Mr. White denied the request, informing Ms. Del Castillo that he did
5 not recommend transfers for probationary employees, explaining that a transfer would be
6 "disruptive" during the training period. Id.

7 **D. Termination of Ms. Del Castillo's Probationary Employment**

8 Ms. Del Castillo took approved leave from December 29, 2003, through January 4,
9 2004. During this time, Ms. Brothers assumed responsibility for Ms. Del Castillo's cases
10 and, by her account, discovered numerous problems. Among these, Ms. Brothers
11 observed that Ms. Del Castillo neglected to request medical information for cases that had
12 been assigned 3-4 weeks earlier, whereas adjudicators are expected to initiate such
13 requests within 24 hours of receiving a new case. Brothers Aff. ¶ 43, Ex. I.

14 Thereafter, Mr. White recommended the termination of Ms. Del Castillo's
15 probationary employment to DDS Director Dr. Jones. After considering documentation
16 and feedback from Ms. Brothers, Ms. Fisk, and various medical consultants, Dr. Jones
17 determined that Ms. Del Castillo was not performing satisfactorily. Jones Aff. ¶ 8, Ex. E
18 (Dkt. # 86).⁴ During a meeting held on January 5, 2004, Dr. Jones provided Ms. Del
19 Castillo with a performance evaluation and a letter of termination effective January 12,
20 2004. Id.

21 In addition to Ms. Diaz Del Castillo, the DDS provided one other adjudicator
22 trainee, a Caucasian woman in her 40s, with a letter of termination on January 5, 2004.
23 The DDS subsequently hired two new adjudicators. The first adjudicator, a 49-year-old
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25 ⁴Dr. Jones's assessment noted, among other issues, failure to recognize correct medical
26 sources, development of claims without supervisor approval, rating claims without proper
27 development, delay in creating case plans and ordering medical evidence, failure to accurately
28 analyze impairments and functioning ability, and failure to follow medical consultants'
instructions. Jones Aff. ¶ 8, Ex. E.

1 African-American woman, began working in January 2004. The DDS hired a second
 2 adjudicator, a 60 year-old Caucasian woman, in May 2004. Both successfully completed
 3 their 6-month probationary periods. White Aff. ¶ 32, Ex. F; Brothers Aff. ¶ 39.

4 Ms. Del Castillo filed her original complaint on June 20, 2005. Her third amended
 5 complaint alleges hostile work environment, disparate treatment, and retaliation on the
 6 basis of her age and race or national origin. She seeks relief under Title VII of the Civil
 7 Rights Act of 1964 (“Title VII”), 42 § U.S.C. 2000e-2(a)(1), the Age Discrimination in
 8 Employment Act (“ADEA”), 29 U.S.C. § 623(a)(1), and the Washington Law Against
 9 Discrimination (“WLAD”), RCW § 49.60.010, et seq. The DSHS now moves for
 10 summary judgment.

11 **III. ANALYSIS**

12 **A. Summary Judgment Standard**

13 Summary judgment is appropriate if the evidence, when viewed in the light most
 14 favorable to the non-moving party, demonstrates there is no genuine issue of material
 15 fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Galen v.
 16 County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the
 17 initial burden of showing there is no material factual dispute and he or she is entitled to
 18 prevail as a matter of law. Celotex, 477 U.S. at 323. The moving party can satisfy this
 19 burden in two ways: (1) by producing evidence that negates an essential element of the
 20 non-moving party’s case, or (2) after suitable discovery, by showing that the non-moving
 21 party does not have enough evidence of an essential element to carry its burden of
 22 persuasion at trial. Id. at 322-23; see also Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
 23 Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets its burden, the
 24 opposing party must present evidence to support its claim or defense. Cline v. Indust.
 25 Maint. Eng’g. & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000). For purely legal
 26 questions, summary judgment is appropriate without deference to the non-moving party.

B. Eleventh Amendment Immunity

Defendants move to dismiss Ms. Del Castillo’s claims under the ADEA and WLAD on the basis of Eleventh Amendment immunity. The Eleventh Amendment grants sovereign immunity to states against suit in federal court: “[E]ach State is a sovereign entity in our federal system; and . . . it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (quotation and citation omitted).⁵ As a state agency, the DSHS is entitled to invoke the protections of the Eleventh Amendment. See In re Pegasus Gold Corp., 394 F.3d 1189, 1195 (9th Cir. 2005) (“[A]gencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court.”) (quotation and citation omitted).

There are, however, two “well-established” exceptions to the Eleventh Amendment bar: legislative abrogation of immunity by express congressional intent under its Fourteenth Amendment powers, and waiver of immunity by a state itself. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). By enacting Title VII under its Fourteenth Amendment powers, Congress abrogated the sovereign immunity of states to suits under Title VII. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Accordingly, the DSHS concedes that the Eleventh Amendment does not bar Ms. Del Castillo’s claims under Title VII. By contrast, the United States Supreme Court has specifically held that Congress did not validly abrogate Eleventh Amendment immunity when it enacted the ADEA. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000). Thus, Ms. Del Castillo may not proceed under a theory of Congressional abrogation in regard to the ADEA. This exception is likewise inapplicable to the WLAD – a statute enacted by the Washington Legislature.

⁵Although an exception to this rule permits suits for prospective injunctive relief against a state official, see Ex parte Young, 209 U.S. 123, 160 (1908), Ms. Del Castillo does not name a DSHS official as a defendant.

1 The United States Supreme Court has long recognized that a state's sovereign
 2 immunity is a "personal privilege which it may waive at its pleasure." Clark v. Barnard,
 3 108 U.S. 436, 447 (1883). Federal courts find waiver if the state makes a "clear
 4 declaration that it intends to submit itself to [federal] jurisdiction." College Savings Bank
 5 v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999). Statutes
 6 or constitutional provisions expressing a general waiver of sovereign immunity, without
 7 expressly subjecting the state to suit in federal court, do not waive Eleventh Amendment
 8 immunity. Atascadero, 473 U.S. at 238. Here, Washington's Constitution generally
 9 provides that the "[state] legislature shall direct by law, in what manner, and in what
 10 courts, suits may be brought against the state." Wash. Const. art. II, § 26. RCW §
 11 4.92.010 gives effect to this mandate in specifying that persons with claims against the
 12 state "shall have a right of action . . . in the superior court." While this statute expresses
 13 the state's consent to be sued, it confers consent only with respect to state court.⁶
 14 Accordingly, the court concludes that Washington has not waived its Eleventh
 15 Amendment immunity because neither the provisions of the state Constitution, nor the
 16 related statutory provision, specifically indicate Washington's willingness to be sued in
 17 federal court. See Skokomish Indian Tribe v. France, 269 F.2d 555, 561 (9th Cir. 1959)
 18 (recognizing that RCW § 4.92.010 expresses Washington's consent to be sued only with
 19 respect to suits in state court); Rains v. State, 674 P.2d 165, 170 (Wash. 1983)
 20 (recognizing that Washington has not waived the protection of the Eleventh Amendment).

21 The court finds unavailing Ms. Del Castillo's argument that the DSHS waived its
 22 immunity by defending this case on the merits and supposedly failing to raise immunity
 23 in a timely matter. A waiver occurs "when the state's conduct during the litigation

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 25 ⁶Notably, a related statutory provision imposes an additional jurisdictional barrier to Ms.
 26 Del Castillo's WLAD claims. RCW § 4.92.100 provides that a plaintiff asserting claims for
 27 damages against the state must first file her claims with the state's risk management division. See
 28 Blair v. Washington State Univ., 740 P.2d 1379, 1389 (Wash. 1987) (upholding RCW §
 4.92.100's notice provision as jurisdictional bar to WLAD claims). There is no evidence that Ms.
 Del Castillo has fulfilled this provision.

clearly manifests acceptance of the federal court’s jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity.” Hill v. Blind Indus. and Servs., 179 F.3d 754, 759 (9th Cir.1999); see also Demshki v. Monteith, 255 F.3d 986, 989 (9th Cir. 2001) (recognizing “that Eleventh Amendment immunity is an affirmative defense . . . that must be raised early in the proceedings to provide fair warning to the plaintiff”). The DSHS timely asserted sovereign immunity in its answer to Ms. Del Castillo’s second amended complaint – the first complaint to allege ADEA claims. See Answer ¶ 13 (Dkt. # 41). The DSHS again asserted sovereign immunity in its answer to Ms. Del Castillo’s third amended complaint. See Answer at ¶ 58 (Dkt. # 80). Under the present circumstances, the DSHS provided Ms. Del Castillo with a fair warning of its intent to assert an immunity defense, and thus, it has not waived immunity through its conduct. Cf. Hill, 179 F.3d at 756 (holding that state defendant waived immunity “by participating in extensive pre-trial activities and waiting until the first day of trial” to raise immunity defense).

Because Ms. Del Castillo’s claims under the ADEA and WLAD are barred by the Eleventh Amendment, and neither exception applies, the court grants the DSHS’s motion for summary judgment with respect to all claims asserted under these statutes. The court’s dismissal of Ms. Del Castillo’s claims under the WLAD is without prejudice to refile such claims in a court of competent jurisdiction.

C. Title VII Claims

Ms. Del Castillo alleges that the DSHS’s actions violated Title VII’s protection against invidious discrimination in the workplace. See 42 U.S.C. § 2000e-2(a)(1) (making it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).⁷

⁷The DSHS concedes that Ms. Del Castillo is a member of a protected class on account of her race or national origin.

1 Ms. Del Castillo raises three separate Title VII claims: creation of a racially hostile work
2 environment, disparate treatment on account of race or national origin, and retaliation for
3 engaging in a protected activity.

4 At the threshold, the court rejects the DSHS's argument that Ms. Del Castillo's
5 Title VII claims are untimely. Ms. Del Castillo received her right to sue letter from the
6 EEOC on March 25, 2005. Clarke Aff. ¶ 2 (Dkt. # 106). On June 20, 2005, prior to the
7 expiration of the 90-day period prescribed by 42 U.S.C. § 2000e-5(f)(1), Ms. Del Castillo
8 filed a motion for leave to proceed in forma pauperis ("IFP") to which she attached her
9 complaint. The DSHS contends that Ms. Del Castillo did not file her complaint until
10 June 29, 2005 – the date the court actually granted her IFP status, and 96 days following
11 receipt of the right to sue letter. In so arguing, the DSHS overreaches. A complaint is
12 considered filed when it is placed in the possession of the clerk of the court. Cintron v.
13 Union Pac. R.R. Co., 813 F.2d 917, 920 (9th Cir. 1987). The court considers Ms. Del
14 Castillo's complaint as constructively filed on the date she filed her motion for IFP status,
15 or June 20, 2005.

16 **1. Hostile Work Environment**

17 To establish a prima facie hostile work environment claim under Title VII, Ms.
18 Del Castillo must raise a triable issue of fact as to whether: (1) the DSHS subjected her to
19 verbal or physical conduct because of her race or national origin; (2) the conduct was
20 unwelcome; and (3) the conduct was "sufficiently severe or pervasive to alter the
21 conditions of [her] employment and create an abusive work environment." Vasquez v.
22 County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003). The conduct at issue must be
23 perceived as abusive, both subjectively from Ms. Del Castillo's perspective and
24 objectively from the perspective of a reasonable Hispanic. See McGinest v. GTE Serv.
25 Corp., 360 F.3d 1103, 1115 (9th Cir. 2004).

26 The court concludes that Ms. Del Castillo has failed to make out a prima facie
27 claim of a hostile work environment. While Ms. Del Castillo may have subjectively
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1 experienced hostility, she fails to bring forth evidence to demonstrate that the DSHS
2 subjected her to verbal or physical conduct, based on her race or national origin, that a
3 reasonable Hispanic would find abusive. Importantly, Title VII is not a “general civility
4 code.” Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted). To
5 that end, a hostile work environment is uniformly characterized by the existence of either
6 severe or pervasive racial slurs, offensive jokes, epithets, racially derogatory remarks,
7 taunts and the like. Compare Vasquez, 349 F.3d 643-44 (reviewing case law and holding
8 that two racial epithets directed at plaintiff were insufficient to create a hostile working
9 environment), with Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 872-73 (9th Cir.
10 2001) (holding that hostile work environment existed where plaintiff was subjected to
11 relentless insults, name-calling, and vulgarities).

12 The conduct of Ms. Del Castillo’s supervisors falls into the “simple teasing” and
13 “offhand comments” category of non-actionable discrimination. See Manatt v. Bank of
14 Am., 339 F.3d 792, 798 (9th Cir. 2003). Viewing the evidence in a light most favorable
15 to Ms. Del Castillo, the court accepts as true her allegation that on two occasions during
16 classroom instruction, Ms. Fisk identified “taco maker” as an appropriate occupation for
17 a Hispanic DDS claimant. The court further considers Mr. White’s jab at Ms. Del
18 Castillo’s Spanish surname as signifying royalty, which was at least nominally directed at
19 Ms. Del Castillo’s national origin. The court additionally accepts as true the allegations
20 regarding Ms. Brother’s criticism of Ms. Del Castillo’s “strong accent” and the
21 admonition concerning communication in Spanish as the province of DSHS translators.
22 Even considering this conduct within the context of Ms. Del Castillo’s status as the sole
23 Hispanic trainee, the court concludes that her allegations are neither sufficiently severe
24 nor pervasive to alter the conditions of employment. See id. (holding that racial jokes,
25 ridicule of plaintiff’s accent, and act of pulling eyes back to imitate or mock the
26 appearance of Asians were insufficient to create a hostile work environment); Vasquez,
27 349 F.3d at 643 (finding no hostile environment discrimination where the employee was
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1 told that he had “a typical Hispanic macho attitude,” that he should work in the field
2 because “Hispanics do good in the field” and where he was yelled at in front of others).

3 As to Ms. Del Castillo’s remaining allegations concerning her experiences during
4 training, she fails to produce evidence to show that her supervisors’ conduct was based
5 on her race or national origin. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S.
6 75, 80 (1998) (“Title VII does not prohibit all verbal or physical harassment in the
7 workplace; it is directed only at *discrimination*”) (emphasis in original). In regard
8 to Ms. Fisk’s ejection of Ms. Del Castillo from her class, Ms. Del Castillo’s own
9 testimony corroborates that she was ill the day Ms. Fisk sent her home. See Del Castillo
10 Decl. ¶ 41 (“I was still sick when I arrived home . . . and had to visit my physician, who
11 prescribed medicine.”). The court therefore cannot conclude that the incident manifests
12 racial animus. As to the use of the “diminutive,” “Espie” on Ms. Del Castillo’s training
13 certificate, the court is not persuaded that the presence of a shortened version of
14 “Esperanza” evidences conduct of a racially discriminatory nature.

15 Taken in the light most favorable to Ms. Del Castillo, the facts indicate that she
16 may have subjectively experienced an unpleasant working environment – but not
17 harassment based on race or national origin sufficient to give rise to a claim under Title
18 VII. Accordingly, the court grants the DSHS’s motion for summary judgment as to Ms.
19 Del Castillo’s hostile work environment claim.

20 **2. Disparate Treatment**

21 Ms. Del Castillo alleges disparate treatment based on her race or national origin
22 with respect to the training DSHS provided, its denial of her request to transfer to a
23 different division, and its decision to terminate her probationary employment. Absent
24 direct evidence of discrimination, Ms. Del Castillo may prove her case through
25 circumstantial evidence under the burden-shifting analysis of McDonnell Douglas Corp.
26 v. Green, 411 U.S. 792, 802-03 (1973). To withstand summary judgment on a
27 discrimination claim based on race or national origin, a plaintiff must provide some
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1 evidence to meet the shifting burdens of proof that she would face at trial. First, a
2 plaintiff must establish a prima facie case by providing evidence that gives rise to an
3 inference of unlawful discrimination. Lyons v. England, 307 F.3d 1092, 1112 (9th Cir.
4 2002). A prima facie case creates a rebuttable presumption that the defendant employer
5 can counter by showing facially nondiscriminatory reasons for its actions. Id. If the
6 employer sustains this burden, the plaintiff must then demonstrate that the proffered
7 nondiscriminatory reason is merely a pretext for discrimination. The plaintiff can prove
8 pretext either (1) indirectly, by showing that the employer's proffered explanation is
9 "unworthy of credence" because it is internally inconsistent or otherwise not believable,
10 or (2) directly, by showing that unlawful discrimination more likely motivated the
11 employer. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220-22 (9th Cir. 1998).

12 **a. Training Opportunities**

13 Ms. Del Castillo alleges disparate treatment in the DSHS's provision of training
14 opportunities. In order to establish a prima facie case, she must show that: (1) she
15 belonged to a protected class; (2) she was qualified for her job; (3) she was subjected to
16 an adverse employment action; and (4) similarly situated employees not in her protected
17 class received more favorable treatment. Kang v. U. Lim Am., Inc., 296 F.3d 810, 818
18 (9th Cir. 2002). Here, Ms. Del Castillo's claims founder on the third and fourth elements
19 of the prima facie case.

20 With regard to training opportunities, Ms. Del Castillo alleges the following:
21 unlike other trainees, her supervisors did not offer her one-on-one supervisory guidance;
22 the DSHS segregated her from other trainees; her supervisors limited her to submitting
23 written questions; and the DSHS denied her the opportunity to repeat training.

24 Ms. Del Castillo fails to produce evidence that she was, in fact, denied training
25 opportunities available to similarly situated employees. The DSHS's evidence shows,
26 that like all trainees, Ms. Del Castillo had access to her direct supervisor, the trainer,
27 three designated medical consultants, and, in the absence of her direct supervisor, other
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1 supervisors. Fisk Decl. ¶ 5, 8, 11. Ms. Del Castillo's allegation as to the denial of one-
2 on-one training is both vague and unspecified; she does not identify a trainee whose
3 experience in this regard was distinct from hers, nor does she directly dispute Ms.
4 Brother's testimony that she in fact provided Ms. Del Castillo with one-on-one training.
5 Brothers Aff. ¶ 33. While Ms. Del Castillo surmises that the DDS provided trainees on
6 the fourth floor with greater opportunities to succeed, she fails to produce evidence to
7 support this allegation. Furthermore, Ms. Del Castillo does not dispute the DSHS's
8 evidence that it required all trainees to submit questions concerning their cases in written
9 form. See Brothers Aff. ¶ 10 (describing "Electronic Worksheet System"). Lastly, as to
10 the DSHS's purported denial of the opportunity to repeat training, there is no evidence
11 that the DSHS afforded such an opportunity to a similarly situated trainee. In fact, the
12 DSHS terminated the employment of another trainee for performance-related issues on
13 the same date it terminated Ms. Del Castillo's employment. White Aff. ¶ 26.

14 Because Ms. Del Castillo has neither demonstrated that the DSHS subjected to her
15 to an adverse employment action, nor that similarly situated employees received more
16 favorable treatment, the court grants the DSHS's motion with regard to training
17 opportunities.

18 **b. Refusal of Ms. Del Castillo's Request to Transfer**

19 The disparate treatment claim on the basis of the DSHS's denial of Ms. Del
20 Castillo's request to transfer likewise founders on the third and fourth elements of the
21 prima facie case. Mr. White's decision to deny Ms. Del Castillo's request to transfer did
22 not constitute an adverse employment action because it was not a "disadvantageous"
23 change in the workplace, but a continuation of the status quo. See generally Ray v.
24 Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (discussing the range of adverse
25 employment actions). Moreover, Ms. Del Castillo fails to produce evidence of any
26 probationary employee who was granted a transfer during his or her training period.
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1 Because there is no evidence that a similarly situated employee received more favorable
2 treatment, this claim too fails.

3 **c. Termination of Ms. Del Castillo's Probationary Employment**

4 As to Ms. Del Castillo's claim of wrongful termination, the court concludes that
5 she has adduced sufficient evidence to establish a prima facie case. There is no dispute
6 that the DSHS terminated Ms. Del Castillo and that it replaced her with a non-Hispanic
7 candidate.

8 Because Ms. Del Castillo surmounts this initial hurdle, the burden shifts to the
9 defendant to produce evidence demonstrating a legitimate, nondiscriminatory reason for
10 its action. McDonnell Douglas, 411 U.S. at 802. Here, the DSHS demonstrates
11 legitimate, facially nondiscriminatory reasons for its decision to terminate Ms. Del
12 Castillo's employment through its evidence of her performance-related issues. See, e.g.,
13 Fisk Aff., Ex. A (evaluations from September 2003 through November 2003 stating Ms.
14 Brothers' concerns with Ms. Del Castillo's performance); Jones Aff., Ex. E (letter of
15 termination listing 10 areas in which Ms. Del Castillo failed to meet minimum acceptable
16 standards). The DSHS has met its burden by providing a legitimate reason for discharge,
17 and thus, the presumption of unlawful discrimination "drops out of the picture," and Ms.
18 Del Castillo must show that the DSHS's alleged reason for terminating her was merely a
19 pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).
20 She may prove pretext either by direct or circumstantial evidence. Godwin, 150 F.3d at
21 1220-22. Relying on circumstantial evidence to show pretext, however, requires Ms. Del
22 Castillo to "put forward specific and substantial evidence" challenging the credibility of
23 the DSHS's motive. Id. at 1221. The court concludes that Ms. Del Castillo's claim
24 ultimately fails because she has not produced sufficient evidence of pretext to meet her
25 burden.

26 Ms. Del Castillo has offered no direct evidence of discriminatory intent. "Direct
27 evidence is evidence which, if believed, proves the fact of discriminatory animus without
28

1 inference or presumption.” Id. The Ninth Circuit has held that a “stray remark” that is
2 “uttered in an ambivalent manner and [is] not tied directly to [the plaintiff]’s
3 termination,” is insufficient to constitute direct evidence of pretext. Id. (quotation and
4 citation omitted). While the court is troubled by Ms. Fisk’s “taco maker” teaching
5 example, it falls short of proving discriminatory animus in the context of Ms. Del
6 Castillo’s termination. Ms. Brother’s comment concerning Ms. Del Castillo’s accent and
7 her directive concerning the use of a translator are also insufficient to prove hostility on
8 the basis of Ms. Del Castillo’s race or national origin “without inference or
9 presumption.” See id. Moreover, Ms. Del Castillo has not shown the necessary nexus
10 between any of these remarks and Dr. Jones’s ultimate decision to terminate her
11 employment.

12 As to circumstantial proof, other than Ms. Del Castillo’s opinion that her negative
13 evaluations were unwarranted, she produces no evidence to the contrary of the DSHS’s
14 proffer of her performance-related issues. See Bradley v. Harcourt, Brace and Co., 104
15 F.3d 267, 270 (9th Cir. 1996) ([A]n employee’s subjective personal judgments of her
16 competence alone do not raise a genuine issue of material fact.”) (citation omitted). Ms.
17 Del Castillo’s contention that she quickly processed her cases is unavailing, as her
18 supervisors’ negative evaluations focus on the quality of her work, not its quantity. See
19 Fisk Decl., Ex. A. The court is also unpersuaded by Ms. Del Castillo’s argument that she
20 only began receiving negative evaluations after she lodged her complaints concerning the
21 “taco maker” remark. The DSHS’s undisputed evidence establishes that Ms. Del Castillo
22 first complained about the remark on or about October 24, 2003. Brothers Aff. ¶ 25. The
23 performance evaluations, however, show that Ms. Brothers began noting concerns with
24 Ms. Del Castillo’s performance as early as October 3, 2003, and October 21, 2003. See
25 Fisk Decl., Ex. A. Finally, Ms. Del Castillo’s vague and unspecified claim that there
26 were technical problems with the DSHS’s computer systems is unsupported by any
27 evidence.

1 In sum, the court finds that Ms. Del Castillo's contentions do not meet the
2 standard of specific and substantial evidence necessary to show that the DSHS's reasons
3 for her termination are unworthy of credence, or that unlawful discrimination was the
4 more likely motivation for her termination. The court therefore grants the DSHS's
5 motion for summary judgment on Ms. Del Castillo's unlawful termination claim.

6 **3. Retaliation**

7 Like the disparate treatment claim, the court analyzes a summary judgment motion
8 on a retaliation claim under the burden-shifting framework of McDonnell Douglas, 411
9 U.S. at 802-03. To establish a prima facie case of retaliation, Ms. Del Castillo must
10 show that she engaged in a protected activity and that the DSHS took adverse
11 employment action against her because of it. Ray, 217 F.3d at 1240. Ms. Del Castillo
12 must establish a causal link between the protected activity and the adverse employment
13 action. Id.

14 The court finds that Ms. Del Castillo has produced sufficient evidence to satisfy
15 the first element of a prima facie case of retaliation. Ms. Del Castillo engaged in a
16 protected opposition activity if she reasonably believed that the conduct she opposed
17 (here, discrimination on the basis of national origin or race) constituted a violation of
18 Title VII. Moyo v. Gomez, 32 F.3d 1382, 1386-86 (9th Cir. 1994). Ms. Del Castillo's
19 objections to the "taco maker" remark suffice. See Ray, 217 F.3d at 1240 n.3
20 (recognizing that an informal complaint of discrimination to a supervisor is a protected
21 activity).⁸

22 As to the occurrence of an adverse employment action, the court finds that the
23 termination of employment plainly qualifies. In addition, the court assumes without
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26 ⁸Ms. Del Castillo presents evidence of additional complaints concerning, for instance, her
27 supervisors directives not to ask questions and isolation on the third floor. Absent evidence
28 demonstrating that she complained of unlawful discrimination, such generalized grievances do not
qualify as protected activities.

1 deciding, that Ms. Del Castillo's below-average performance evaluations and her ejection
2 from class, also constitute adverse employment actions.

3 The record, however, falls short of establishing a causal connection between Ms.
4 Del Castillo's complaint, which occurred on or about October 24, 2003, and her below-
5 average evaluations because, as described above, the negative feedback began before she
6 complained. What is more, even if the court were to conclude that Ms. Del Castillo
7 could establish a causal connection between her complaint and her ejection from class or
8 the termination of her employment, the DSHS has met its burden in producing evidence
9 of non-retaliatory reasons for each of these actions. As described above, the DSHS's
10 termination of Ms. Del Castillo's employment was justified by legitimate,
11 nondiscriminatory, performance-related issues. As to Ms. Del Castillo's ejection from
12 class, Ms. Fisk sent Ms. Del Castillo home for the stated – and undisputed – reason that
13 she was ill.

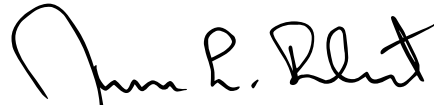
14 As set forth in the court's discussion of the wrongful termination claim, Ms. Del
15 Castillo has failed to come forward with evidence of pretext either by showing that the
16 DSHS's proffered explanations are "unworthy of credence" or through direct evidence of
17 discriminatory animus. See Godwin, 150 F.3d at 1220-22. The court therefore grants
18 the DSHS's motion for summary judgment on Ms. Del Castillo's retaliation claim.

19 IV. CONCLUSION

20 For the reasons stated above, the court GRANTS the DSHS's motion for summary
21 judgment (Dkt. # 82) as to all claims. The court's dismissal of Ms. Del Castillo's WLAD
22 claims on sovereign immunity grounds is without prejudice to asserting such claims in a
23 court of competent jurisdiction. The court dismisses the remaining claims against the
24 DSHS with prejudice.

25 The court directs the clerk to enter judgment consistent with this order.
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1 Dated this 14th day of September, 2007.

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5 JAMES L. ROBART
6 United States District Judge
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